IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUMMONS FOR JUDGMENT NO. 580 OF 2006
IN
SUMMARY SUIT NO. 3037 OF 2006.

Sood Sizing Industries. ... Plaintiff.
Versus.
Tamil Nadu Newsprint and Papers Ltd. ... Defendant.

Shri Praveer Diwan with Shri Ahmed and Ms.Aarti Bannerjee i/by M/s.Little & Co. for the Plaintiff.

Shri B.P.Saraf i/by Shri Yogesh Adhia for the Defendant.

CORAM : ABHAY S.OKA, J.

DATED : 17th July, 2007.

P.C.:

1. I have heard the submissions of the learned Counsel appearing for the parties. The Plaintiff has filed this suit for recovery of a sum of Rs.12,11,220/- together with interest aggregating to Rs.14,16,696/- with further interest as prayed. According to the case made out by the Plaintiff, the Defendant issued an advertisement by way of a tender for supply of Fortified Rosin. The Plaintiff submitted the tender document and a purchase order dated 22nd January 2003/31st January 2003 was issued by the Defendant for purchase of certain quantity of Fortified Rosin. The said purchase order was amended whereby the Defendant agreed to make 90% payment within 30 days from the date of receipt of the material supplied by the Plaintiff and the balance 10% was agreed to be released in the subsequent month depending upon the consumption of Fortified Rosin per

tonne of paper in the month.

2. According to the case of the Plaintiff, the purchase order underwent further amendment by letter dated 1st August 2003. According to the case of the Plaintiff, by the amendment to the purchase order made on 1st August 2003 it was provided that for the period from 22nd January 2003 to 31st March 2003, the consumption of Fortified Rosin should not exceed 15 kg. per tonne of production failing which pro-rata deduction shall be levied for every kg. increase on landed cost basis. It was provided that for the period from 1st April 2003 to 31st May 2003 consumption norms shall not be applicable and the payment will be made for the actual quantity received without any deduction. Again for the period from 1st June 2003 to 21st January 2004, it was provided that the consumption per tone of machine production shall not exceed 15 kg. failing which pro-rata deduction shall be levied for every kg. The purchase order underwent further change on 17th September 2003 by increasing the quantity.

3. By letters dated 8th August 2003 and 1st March 2004, the Plaintiff called upon the Defendant to pay the outstanding balance on the basis of the purchase orders. By letter dated 1st March 2004 it was pointed out that the amount of Rs.18,09,166/- was overdue. By a further

letter dated 5th January 2004, the Plaintiff called upon the Defendant to make payment of the outstanding bills. A list of outstanding bills was enclosed along with the letter dated 1st March/11th March 2004 sent by the Plaintiff to the Defendant. Only on 13th May 2004, the Defendant replied to the Plaintiff by pointing out that the deduction was made in various bills as per the terms of the purchase order due to higher consumption of chemical over and above the permitted consumption of 15 kgs. per metric tonne of paper. There is a further correspondence made between the parties. By a legal notice dated 1st August 2004 sent by the Advocate for the Plaintiff, the Defendant was called upon to make payment of balance amount due and payable. The said notice was replied to by the Defendant by its reply dated 16th November 2004. According to the case of the Plaintiff for the first time along with the said reply, the Defendant forwarded a chart showing deductions allegedly made by the Defendant.

4. The Plaintiff thereafter filed a summary suit No.1581 of 2005 in this Court for recovery of the said amount which is the subject matter of the present suit. It is the case of the Plaintiff that after discovering the fact that the Plaintiff firm was not registered under the provisions of the Indian Partnership Act, 1932 the Plaintiff moved this Court on 5th May 2006 and

prayed for permission to withdraw the suit with liberty to file a fresh suit. It is stated that as this Court opined that there was no urgency, the suit was simplicitor adjourned to beyond vacation. According to the case of the Plaintiff, the learned Vacation Judge was moved on 10th May 2006 for withdrawal of the said earlier suit with liberty as prayed. However, the aforesaid prayer was not entertained in vacation in view of the fact that the suit was already adjourned beyond vacation. By order dated 12th June 2006, the Plaintiff was permitted to withdraw the suit with a liberty to file a fresh suit after getting the Plaintiff firm registered. Accordingly, the present suit is lodged on 30th August 2006 after paying the costs as provided in the order passed in the earlier suit.

5. In support of the summons for judgment, the learned Counsel appearing for the Plaintiff submitted that the correspondence annexed to the plaint shows that at the relevant time, the Defendant never came out with the case regarding entitlement to make deduction. He invited my attention to various letters addressed by the Plaintiff to the Defendant and pointed out that only on 13th May 2004, the Defendant belatedly came out with the case that due to higher consumption of chemical over and above the permitted consumption of 15 kgs. per metric tonne, the Defendant has made the deductions. He

pointed out that the said contention is nothing but an afterthought as the Defendant never came out with the said defence though demands were made by sending various letters on 8th October 2003, 1st March 2004, 5th January 2004 and 11th March 2004. He also invited my attention to the letter dated 11th March 2004 sent by the Defendant. He pointed out that in the said letter the Defendant never came out with the case regarding their alleged entitlement to make deductions. In fact it is not even stated in the said letter that the Defendants have made deductions due to higher consumption of chemical over and above the committed consumption of 15 kgs. per metric tonne. He, therefore, submitted that the defence belatedly raised by the Defendant is without any merit and in fact there is no defence available to the Defendant to contest the suit. He has also invited my attention to the various averments made in the plaint as regards the availability of benefit under section 14 of the Limitation Act 1963 to the Plaintiff.

6. The learned Counsel appearing for the Defendant invited my attention to the terms of the modified purchase order and submitted that the Defendant was entitled to make deductions. Another submission of the learned Counsel for the Defendant is that the very fact that the Plaintiff is claiming a benefit under section 14 of the said Act of 1963 shows that even according to

the case of the Plaintiff, the present suit is not instituted within the stipulated period of limitation. His submission is that the question whether the Plaintiff is entitled to the benefit of section 14 of the said Act of 1963 or not can be decided only at the stage of recording of evidence. He placed reliance on a decision of the learned Single Judge of this Court in the case of M/s.Foreshore Cooperative Housing Society Ltd. v/s. Shri Parveen Desai and others (Notice of Motion No.1222 of 2004 in Suit No.2939 of 1999). He submitted that as of today the defence of bar of limitation is available to the Defendant and therefore, this is a fit case for grant of an unconditional leave.

7. By way of a rejoinder, the learned Counsel for the Plaintiff pointed out that it is not necessary in every case that for establishing entitlement to benefit under section 14 of the said Act of 1963, evidence is required to be adduced. He pointed out that once the Plaintiff realised that the earlier suit may fail by reason of non-registration of the firm, immediate steps were taken to move the Court on 5th May 2006 and on 10th May 2006. He submitted that this Court could not take up the matter and that is why the order was passed on 12th June 2006 permitting withdrawal of the earlier suit by granting a liberty to the Plaintiff to file a fresh suit. He invited my attention to the stand taken by the

Defendant in its affidavit-in-reply. He submitted that the only contention raised in the reply is that the benefit of section 14 of the said Act of 1963 is made available only in a case where the suit is instituted in a Court having no jurisdiction to entertain the same. He placed reliance on a decision of the Apex Court in the case of M/s.Haldiram Bhujiawala and another v/s. M/s.Anand Kumar Deepak Kumar and another (AIR 2000 S.C. 1287). He invited my attention to the law laid down by the Apex Court in paragraph 27 thereof which lays down that the benefit of section 14 of the said Act of 1963 will be available in a case where earlier suit is allowed to be withdrawn on the ground that the Plaintiff firm was not registered. He submitted that there is no dispute that the benefit of section 14 will be available to the Plaintiff in the present case and since there is no other defence, the Defendant is not entitled to grant of a leave to defend the suit.

8. I have carefully considered the submissions made by the learned Counsel appearing for the parties. It will be necessary to refer to the material averments in the plaint and particularly in paragraphs 21 and 24. In paragraph 24 it is pleaded that on 15th November 2002 an application for registration of the firm was filed by the partners. It must be noted here that the earlier suit was filed on 4th April 2005. In paragraph 24, the

Plaintiff has stated thus:

> "Pursuant to the filing of the Summons for Judgment in the said Summary Suit, the Defendant had demanded inspection of the Plaintiffs documents including, inter-alia, Certificate evidencing Registration of the plaintiff firm. The plaintiffs thereafter made attempts to obtain the certificate/extract of registration from the Registrar of Firms. **At such time, the plaintiffs discovered that their partnership had not been registered in pursuance of the earlier Application. Furthermore, the office of the Registrar of Firms, insisted upon a fresh Application for registration.** Since, the partnership was not registered as on the date of the filing of the earlier Summary Suit, the Plaintiffs were advised to withdraw the said Summary Suit with liberty to file a fresh suit as also to get the said partnership firm registered. The Plaintiffs thereafter made a fresh Application on 17th day of March 2006 for the registration of their Partnership firm." (Emphasis added).

9. Thus a fresh application for registration was made by the Plaintiff on 17th March 2006. Going by the

case of the Plaintiff, the Application for withdrawal of the suit was not made till 5th May 2006 and the prayer made by the Plaintiff was ultimately acceded to on 12th June 2006. It will be necessary to refer to the order dated 12th June 2006 passed by this Court. In paragraph 6 of the order, this Court has noted the prayer made by the learned Counsel appearing for the Plaintiff that this Court should direct that the period spent by the Plaintiff in prosecuting the earlier suit should be excluded while computing the period of limitation for the fresh suit that which Plaintiff may file after getting the firm registered. The learned Single Judge of this Court observed that the question whether the time spent in prosecuting the earlier suit should excluded for computing the period of limitation under section 14 of the said Act of 1963 has to be considered by the Court when the fresh suit is instituted. After making the said observation, the learned Judge proceeded to observe thus:

> "It goes without saying that in case the Plaintiff institutes a fresh suit he can claim exclusion of time spent in prosecuting this suit in the plaint that he may file and it will be for that court to consider that question on the material produced before it."

10. Turning back to the averments made in paragraph 24 of the plaint, it must be stated here that the Plaintiff has specifically prayed for the exclusion of the time spent in prosecuting the earlier summary suit. A specific averment has been made that upon exclusion of the time as aforesaid, no part of the Plaintiff's cause of action is barred by limitation. Thus going by the averments made in the plaint, it is clear that even the Plaintiff has come out with a case that if the exclusion of the period under section 14 of the said Act of 1963 is not granted, the entire cause of action or atleast a part thereof, would not be within limitation.

11. On a plain reading of section 14(1) of the said Act of 1963, to enable the Plaintiff to claim the benefit, it must be established that the Plaintiff has prosecuted the earlier suit with due diligence. Secondly, the proceedings of the suit must be prosecuted in good faith. As held by the Apex Court in the case of Haldiram Bhujiawala (supra), if it is established by the Plaintiff that the earlier suit was prosecuted with due diligence and in good faith, the Plaintiff will be entitled to exclusion of time as per section 14(1) of the said Act of 1969.

12. From the averments made in the plaint, prima-facie it appears that when the earlier suit was

filed on 4th April 2005, the Plaintiff was not in possession of the registration certificate. In fact after an objection was raised by the Defendant in the said suit, a fresh application was made on 17th March 2006 to the Registrar of Firms for grant of registration. The motion for withdrawal of the suit was made even according to the Plaintiff for the first time on 5th May 2006. Even going by the averments made by the Plaintiff, it is obvious that if it is not established that the Plaintiff is entitled to the benefit of section 14, the claim will not be within limitation. At this stage going by the averments made in the plaint and what is stated in the reply, it is impossible to record a finding that the ingredients of section 14 of the said Act of 1963 are fulfilled by the Plaintiff. Considering the averments made in the plaint in this case, it will be for the Plaintiff to establish the existence of ingredients by leading evidence. Whether there was a due diligence on the part of the Plaintiff and whether the earlier suit was prosecuted in good faith are the questions to be decided on evidence. It is thus obvious that the issue of limitation is certainly a triable issue in this case and therefore, it can be said that there is fair and reasonable defence available to the Defendant to contest the suit.

13. Hence a case is made out for grant of

unconditional leave to defend the suit to the Defendant. Accordingly unconditional leave to defend the suit is granted. Written statement to be filed within a period of eight weeks from today. The suit will be thereafter transferred to the list of commercial causes.

Judge.